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No. 98-241

In the Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL C. BRICKHOUSE, PETITIONER

v.

JONATHAN CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JUDITH E. KRAMER
Deputy Solicitor
ALLEN H. FELDMAN
Associate Solicitor
NATHANIEL I. SPILLER
Deputy Associate Solicitor
MARK S. FLYNN
Attorney
Department of Labor
Washington, D.C. 20210

28 pp

QUESTION PRESENTED

Petitioner was injured at a steel fabrication plant located 800 feet from the water on a 90-acre facility that borders a navigable river. The plant produces components for both ships and non-maritime projects, most of which are delivered by rail but some of which are transported by barge from the facility's dock. The question presented is whether the plant is a situs covered under Section 3(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 903(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 142 F.3d 217. The decision and order of the Benefits Review Board (Pet. App. 21-31) is unreported. The decision and order of the administrative law judge (Pet. App. 32-51) is reported at 29 Ben. Rev. Bd. Serv. (MB) 269.

JURISDICTION

The court of appeals entered its judgment on April 23, 1998. The petition for a writ of certiorari was filed on July 20, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act) provides compensation for work-related injuries that cause the disability or death of covered employees. 33 U.S.C. 908, 909. To be covered by the Act, an injured employee must meet two requirements. The first, the status requirement, is that the employee be engaged in maritime employment.[1] The second, the situs requirement, is that the injury have occurred on a maritime situs. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 264-265 (1977). This case concerns the situs requirement, set out in Section 3(a) of the Act, which specifies that a disability or death is compensable only if it:

> results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. 903(a).

2. Petitioner Michael C. Brickhouse was employed as a welder by Tidewater Steel Company (Tidewater), whose parent corporation is respondent Jonathan Corporation (Jonathan). Pet. App. 4, 36. Petitioner was injured in August 1993 while performing his duties at Tidewater's steel fabrication facility, when a 12-foot square piece of steel fell on him. *Id.* at 4.

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[1] Section 2(3) of the Act defines "employee" (with certain exceptions not relevant here) as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. 902(3).

The Tidewater facility occupies a 90-acre site that is bordered on one side by the Elizabeth River, a navigable waterway. Pet. App. 6, 36. The facility has a dock for loading barges. *Id.* at 6. All of the steel that the facility receives arrives by rail or truck. *Ibid.* Most of the products fabricated at the facility are shipped out by rail or truck, although particularly large ones are shipped out by barge. *Id.* at 6, 37.

The fabrication building at the site is located 800 feet from the water and is divided into three bays. Pet. App. 5, 36-37. One of the bays is used to fabricate components for Jonathan's shipyard projects, and the other two are used to fabricate steel for bridges and other non-maritime projects. *Ibid.*

Most of petitioner's working time was spent on non-maritime projects, and, at the time of his injury, petitioner was working in a non-maritime bay of the plant. Pet. App. 5, 36-37. During the course of his employment, however, petitioner performed welding on components for installation on ships. *Id.* at 5, 39-41. In addition, he loaded barges at the Tidewater facility and traveled to Jonathan's shipyards to help install components. *Id.* at 37-38.

3. Petitioner sought benefits under the LHWCA for total disability arising out of his injury at the Tidewater facility. The only disputed issues were whether petitioner met the Act's situs and status requirements. Pet. App. 35, 41. After a hearing, an administrative law judge (ALJ) ruled in petitioner's favor on both issues. *Id.* at 50.

In determining situs, the ALJ emphasized that "[t]he 90 acre [Tidewater] facility is actually bounded on the backside" by navigable water. Pet. App. 43. The ALJ emphasized as well that one of the three bays at Tidewater's fabrication building is devoted to maritime

projects and that barges are loaded at the facility with pre-fabricated units to be taken to shipboard projects. *Ibid.* The ALJ concluded that, even assuming the majority of Tidewater's work is non-maritime, the evidence established that a significant amount of its work is maritime-related. Because the Tidewater facility is an area adjoining navigable waters that is used for loading and unloading vessels, the ALJ ruled that the facility is a covered situs. *Id.* at 44.[2]

4. On December 20, 1996, the Benefits Review Board affirmed. App., *infra*, 1a-10a.[3] The Board held that the ALJ's situs ruling was consistent with the Fourth Circuit's decision in *Sidwell* v. *Express Container Services, Inc.*, 71 F.3d 1134 (1995), cert. denied, 518 U.S. 1028 (1996), which the Board characterized as holding that an "area" "adjoin[s]" navigable waters within the meaning of Section 3(a) only if it is contiguous with those waters, and it constitutes an "other * * * area" covered by that provision only if it is customarily used in loading, unloading, repairing, dismantling, or building a vessel. App., *infra*, 5a-6a. The Board held that the ALJ properly concluded that the Tidewater facility meets those requirements in light of his findings that the facility is bounded on one side by a navigable waterway and has a dock area from which large completed objects are shipped by barge;

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[2] In determining status, the ALJ concluded that petitioner's welding duties were "a necessary part of * * * shipbuilding," Pet. App. 47, and that a substantial part of petitioner's regular employment included maritime employment. *Id.* at 49-50. Having concluded that petitioner met both the situs and status requirements, the ALJ awarded total disability benefits. *Id.* at 50.

[3] Because the copy of the Benefits Review Board decision appended to the petition is incomplete, we have reprinted the decision in its entirety in an appendix to this brief.

petitioner was injured in a building only 800 feet from the water's edge; and at least one third of the work performed at the facility involves ship construction. *Id.* at 6a.[4]

5. The court of appeals reversed on the situs issue. Pet. App. 1-20. The court held that LHWCA coverage exists only if there is a link between navigable waters and "land side facilities" consisting of "(1) the contiguity of the land side facility and navigable water, and (2) the affinity of the land side facility to longshoremen's work on ships." *Id.* at 14. The court explained that "the kinds of property [*e.g.*, piers, wharfs, dry docks] that the LHWCA enumerates are 'discrete structures or facilities, the very raison d'etre of which is [their] use in connection with navigable waters.'" *Id.* at 16 (quoting *Sidwell*, 71 F.3d at 1138-1139). The court noted that an "other * * * area" is covered by Section 3(a)'s catchall provision only if it adjoins navigable waters and is customarily used for the loading or unloading of vessels or their repair, dismantling, or building. *Id.* at 15.

The court of appeals observed that a steel fabrication plant is not one of the structures specifically enumerated in Section 3(a). The court further concluded that the Tidewater plant is not "a similar type of facility that fits the [Section's] catchall provision." Pet. App. 17. The court emphasized that the employees' work does not take them routinely from within the plant onto adjoining water and back again but rather keeps them in the plant to fabricate parts that are usually shipped by rail or truck to an inland site or elsewhere. *Id.* at 17-

[4] The Board also upheld the ALJ's determination that petitioner met the LHWCA's status requirement. App., *infra*, 9a. Accordingly, the Board affirmed the ALJ's situs and status rulings and upheld the award of benefits.

18, 19. The court concluded that the very fact that components are shipped from the plant before their installation "insulates the plant from navigable waters and distinguishes [petitioner]'s work location from that of the traditional longshoreman's workplace at the water's edge." *Id.* at 18. Moreover, the court observed that, although petitioner occasionally worked on ships, he traveled by land to the shipyards where he then installed fabricated parts. *Ibid.*

The court acknowledged that the plant's property is contiguous with navigable waters, but concluded that such contiguity is "simply fortuitous." Pet. App. 18. The court noted that the plant is "almost a thousand feet" from the water's edge and reiterated that the plant's workers do not customarily move between land and water but rather remain in the plant as they would if the plant were located at any inland site. *Id.* at 18-19. The court also emphasized that the plant does not serve ships at the water's edge or build or repair them at its barge dock. *Id.* at 19. Moreover, the court determined that it is not meaningful that components are on rare occasions shipped by barge from Tidewater's dock because such transport would be relevant only if it were the customary method of shipment and if Tidewater's employees were longshore workers who customarily loaded barges at the facility. *Ibid.* Accordingly, the court held that petitioner was not injured on a covered situs and consequently reversed the award of benefits. *Id.* at 19-20.

ARGUMENT

The decision of the court of appeals rests on the particular facts of this case and does not conflict with any decision of this Court or of any other court of

appeals. Review by this Court is therefore not warranted.[5]

1. As the court of appeals recognized, the question whether the steel fabrication plant at which petitioner was injured is a covered situs depends upon whether it is part of an area adjoining navigable waters that is "customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." 33 U.S.C. 903(a).[6] The Board concluded that the facility is a covered situs because it abuts navigable waters and is customarily used for the construction, as well as loading and unloading, of vessels. In reaching that conclusion, the Board emphasized that the facility is bounded on one side by a navigable river and that the building at the facility in which petitioner was injured is only 800 feet from the water's edge. App., *infra*, 6a; see also Pet. App. 36-37 (ALJ findings) ¶¶ 5-7. The Board further emphasized that a least one-third of the work at the facility involves fabrication of components for ships, and that large completed components are shipped out by barge from the facility. App., *infra*, 6a; see also Pet. App. 37 (ALJ finding) ¶ 6.

In contrast, the court of appeals concluded that the fabrication plant lacks the connection to navigable waters necessary to render it a LHWCA situs. See Pet. App. 19 ("the steel fabrication plant * * * was not a facility, the 'raison d'etre of which is its use in connection' with the nearby navigable waters") (quot-

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[5] The Director of the Office of Workers' Compensation did not participate in the proceedings before the Benefits Review Board or the court of appeals.

[6] There is no dispute that the plant is not an "adjoining pier, wharf, dry dock, terminal, building way, [or] marine railway." 33 U.S.C. 903(a).

ing *Sidwell* v. *Express Container Services, Inc.*, 71 F.3d 1134, 1139 (4th Cir. 1995), cert. denied, 518 U.S. 1028 (1996)). The court acknowledged that the plant's property adjoins navigable water but concluded that the fact that the facility is contiguous with the water is "fortuitous." Pet. App. 18. The court of appeals reasoned that the plant is "almost a thousand feet from the water's edge, and it [is] not 'customary' for the plant's workers to move between land and water in any regular way." *Ibid.* The court stressed that, although the plant "serve[s] ships at other locations by manufacturing components," ships are not repaired or built at the facility's dock, and components are only rarely, rather than customarily, shipped by barge from the dock. *Id.* at 19.

The court of appeals correctly recognized that the central question in this case is whether the fabrication plant is part of an area "customarily used" for loading, unloading, or building vessels. Petitioner argues that the court of appeals erred because it gave insufficient weight to the facts that the fabrication plant constructs components for ships and that the components are, if sufficiently large, loaded onto barges at the facility's dock for transport to ships or shipbuilding sites. The court of appeals, however, viewed that transport as rare and found the record insufficient to permit an inference that shipment by barge or loading onto barges is "customary." Pet. App. 19.

The court of appeals also emphasized that Tidewater's workers do not regularly traverse between land and water. *Id.* at 17-18, 19. The "customary" uses of an adjoining area that trigger the statute's coverage do not necessarily entail that action. Cf. *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 77-80 (1979) (LHWCA coverage is not limited to workers who "could have been assigned"

to work over navigable waters; worker may be engaged in "maritime employment" even though he performs his duties solely on land). Contrary to petitioner's contention (Pet. 16), however, we do not read the court of appeals to have held that routine or customary movement between the water and an adjoining area is always necessary in order for that area to be a covered situs. Rather, the court noted the absence of such movement as one of several factors indicating that the fabricating plant in this case was not part of a covered situs.[7]

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[7] Although the court of appeals noted that the plant is "almost a thousand feet from the water's edge," the court did not conclude that the plant is not part of an area that adjoins water. Rather, the court concluded that the plant does not "customar[il]y" require close proximity to navigable water. Pet. App. 18-19. Thus, we do not read the decision as establishing an unduly narrow contiguity test for determining whether a putative situs adjoins navigable waters. Cf. LHWCA Program Memorandum No. 58, at 13-14 (Aug. 10, 1977) ("it does not defeat coverage of a shipbuilder's injury that the precise location where it occurred—for example, a fabrication shop—does not itself adjoin the water; it suffices if the overall *area* within which it occurred (generally a shipyard) adjoins the water") (emphasis in original); *id.* at 10-11. Although petitioner equates the questions whether a situs has a physical connection to navigable waters and whether it has a functional connection (Pet. 10-16), the two inquiries are distinct. The issue in this case is whether the plant has the necessary functional connection to navigable waters, while the issue in *Sidwell* and *Parker* v. *Director, Office of Workers Compensation Programs*, 75 F.3d 929 (4th Cir.), cert. denied, 117 S. Ct. 58 (1996), overruled on other grounds, *Ingalls Shipbuilding, Inc.* v. *Director, Office of Workers Compensation Programs*, 519 U.S. 248 (1997), was whether the facilities at issue in those cases had the necessary physical connection. See *Sidwell*, 71 F.3d at 1135 (cargo container repair facility, located eight-tenths of a mile from the terminal and separated from it by various businesses and residential developments, does not adjoin navigable waters); *Parker*, 75 F.3d at 931-932 (repair facility, located five

The court of appeals' decision in this case turns on a relatively unusual confluence of facts. The application of law to facts does not ordinarily present a question warranting this Court's review. See, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (Court "do[es] not grant a certiorari to review evidence and discuss specific facts"). There is no issue of general importance in this case to warrant a departure from that usual rule.

2. Contrary to petitioner's contention (Pet. 16-22), the Fourth Circuit's decision in this case does not directly conflict with that of any other court of appeals. In *Alford* v. *American Bridge Division, United States Steel Corporation*, 642 F.2d 807, 813-816, modified on other grounds, 655 F.2d 86 (1981), cert. denied, 455 U.S. 927 (1982), the Fifth Circuit held that an 86-acre American Bridge facility, which bordered a navigable river and had previously been a shipyard, was a covered LHWCA situs. See also *id.* at 809. Its primary function since it had ceased being a shipyard was to fabricate steel components for vessels, as well as for bridges, steel buildings, and power plants. *Ibid.* When large steel components were fabricated for vessels, they were loaded onto ocean-going barges for delivery to one of two shipyards. *Ibid.*

In ruling that the facility met the Section 3(a) situs test, the court emphasized that the facility's location on the water was "essential" to the company's business based on the testimony of a company witness that there was no other means besides barges to transport the large modules. 642 F.2d at 814. The court rejected the

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miles from terminal and one mile from nearest navigable water, does not adjoin navigable waters, even though employees regularly traveled between facility and waterfront and performed repair work at both places).

argument that "shipbuilding" did not take place at the facility because the entire vessel was not constructed there and held that construction of modular components was an integral part of the ongoing process of shipbuilding. See *id.* at 815. Thus, the court concluded "that the geographic location, the plant history and the 'on-going operation' of American Bridge in fabricating component parts of vessels, meets the situs test." *Id.* at 816.

Although there is tension between *Alford* and this case, there is no square conflict. In *Alford*, the court concluded that the facility's location on water was not "merely incidental" but necessary in order to transport the large modules the company produced. 642 F.2d at 814. In contrast, the court of appeals in this case concluded that the Tidewater plant's location near water was a fortuity and that it was only "on rare occasions" that components were shipped by barge. Pet. App. 18, 19. Both decisions, however, viewed the functional connection between the facility's activities and its location on navigable waters as relevant to the determination whether the facility was a covered situs. In addition, although the opinion in this case suggests that the Fourth Circuit might well take a different view than the *Alford* court on whether construction of modular components is shipbuilding, see *id.* at 19, the court of appeals here did not expressly address that issue.

Nor is there a conflict between the Fourth Circuit's holding in this case and the statement of the Ninth Circuit in *Perkins* v. *Marine Terminals Corporation*, 673 F.2d 1097, 1101-1102, cert. denied, 455 U.S. 927 (1982), that a facility need not be used exclusively for maritime purposes in order to be a covered situs. Because the court of appeals here relied on a variety of

factors in concluding that the Tidewater plant is not a covered maritime facility, without identifying any one factor as critical, we do not read the decision as standing for the proposition that majority maritime work is the sine qua non of an LHWCA situs. Indeed, the decision expresses no disagreement with Fourth Circuit precedent that a foundry shop at a shipyard, at which 73% of the production involved non-maritime items, was a covered situs. *Newport News Shipbuilding & Dry Dock Co.* v. *Graham*, 573 F.2d 167, 169 (4th Cir.), cert. denied, 439 U.S. 979 (1978).[8]

Petitioner's contention (Pet. 18-19) that the decision in this case conflicts with the Third Circuit's decision in *Dravo Corporation* v. *Maxin*, 545 F.2d 374 (1976), cert. denied, 433 U.S. 908 (1977), is also without merit. The court there held that a structural steel shop, where workers spent 15% of their time on non-maritime work and 85% on maritime work and which was located at a facility on an island in the Ohio River, was an LHWCA situs. 545 F.2d at 376. The steel shop was the only area at the facility that performed non-maritime work, and the employee seeking compensation had been injured at the shop while burning steel plates that would become

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[8] Petitioner also argues (Pet. 22-23) that this Court should grant certiorari because the decision in this case conflicts with *Newport News* and the Fourth Circuit's similar holding in *Humphries* v. *Director, Office of Workers Compensation Programs*, 834 F.2d 372 (1987), cert. denied, 485 U.S. 1028 (1988). There is no conflict, however, because, as explained above, the court of appeals here did not hold that a situs must be used exclusively for maritime purposes to be covered under the Act. Review is not warranted, in any event, to correct possible inconsistencies among decisions within the Fourth Circuit. "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

bottom decks of barges fabricated by the company at the facility. *Ibid.*

In upholding situs on those facts, the court rejected the argument that the covered situs extended only to the place of assembly of the vessel and that the structural shop's location 2000 feet from the river precluded it from being an area adjoining navigable waters. *Dravo*, 545 F.2d at 381. The court noted that the facility as a whole adjoined navigable water, that the great majority of the work performed in the shop was related to shipbuilding and repair, and that there was no delineation of the work into shipbuilding and non-shipbuilding functions. Accordingly, the court concluded that "the structural steel shop * * * [wa]s an integral part of * * * [the] shipbuilding operations at the complex." *Ibid.*

Thus, the record evidence that shipbuilding was customarily performed at the putative situs was stronger in that case than in this one. Most obviously, the "great majority of the work performed [at the putative situs wa]s related to shipbuilding or ship repair," 545 F.2d at 381, and ships were constructed at the facility, *id.* at 376, a fact that might well have changed the outcome under the Fourth Circuit's analysis here. See Pet. App. 19 (noting that no ships were built, repaired or dismantled at the pier at Tidewater's facility).[9]

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[9] Nor is there any conflict with *Nelson* v. *American Dredging Company*, 143 F.3d 789 (3d Cir. 1998), as petitioner suggests (Pet. 20). The essential difference between the cases lies in the courts' characterization of the facts before them. In *Nelson*, the employer's operations in the area consisted of unloading sand delivered through a pipeline from a dredge and positioning the sand on the beach for reclamation purposes. The court concluded that the unimproved beach was an area customarily used by an employer

In sum, there is no conflict among the courts of appeals on governing legal principles relevant to this case. Review by this Court of the fact-dependent determination that the plant at which petitioner was injured is not a situs covered by the LHWCA is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JUDITH E. KRAMER
Deputy Solicitor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

MARK S. FLYNN
Attorney
Department of Labor

NOVEMBER 1998

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for loading and unloading a vessel. *Id.* at 796-797. By contrast, in this case, the court of appeals concluded that loading of barges was rare, and the fabrication facility was therefore not customarily used by an employer for loading and unloading. Pet. App. 19. Although the *Nelson* court disagreed with the Fourth Circuit's holding in *Sidwell*, *supra*, that a covered situs must be a structure or facility, see 143 F.3d at 797, that rule was not the basis for the Fourth Circuit's decision in this case.

APPENDIX

(Department of Labor Seal)

U.S. Department of Labor

Benefits Review Board
800 K Street, N.W.
Washington, D.C. 20001-8001

BRB NOS. 95-1556 AND 96-1278

MICHAEL C. BRICKHOUSE, CLAIMANT-RESPONDENT

v.

JONATHAN CORPORATION AND
CRAWFORD & COMPANY, EMPLOYER/CARRIER-
PETITIONERS

DECISION AND ORDER

Appeals of the Decision and Order - Awarding Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor, and the Order Designating Authorized Treating Physician of B.E. Voultsides, District Director, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Kelly O. Stokes (Vandeventer, Black, Meredith & Marin), Norfolk, Virginia, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order - Awarding Benefits (94-LHC-1330) of Administrative Law Judge Daniel A. Sarno, Jr., and the Order Designating Authorized Treating Physician (Case No. 5-89883) of District Director B.E. Voultsides rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant suffered a work-related injury on August 14, 1993, during the course of his employment with Tidewater Steel, a wholly owned subsidiary of employer, when a piece of steel fell on him. Claimant underwent surgery to his coccyx and has not returned to work since the date of the accident.

The facts involved in this case are not in dispute. Claimant's injury occurred at Tidewater Steel's facility in Chesapeake, Virginia. The facility sits on a 90 acre site adjoining the South Branch of the Elizabeth River. Large completed projects are shipped out by barges which dock at the facility. The building in which claimant's injury occurred is about 800 feet from the river's

edge and is divided into three bays; Bays 2 and 3 are used for steel construction for various contractors, while Bay 1 is devoted solely to employer's shipboard construction contracts. Claimant's accident occurred in Bay 3 while claimant was working on a non-maritime railroad bridge project. Claimant's overall work as a welder, however, involved both maritime and non-maritime construction. He testified that he did most of his work at the Tidewater Steel facility, but was often assigned to perform shipboard construction at other employer and Navy locations; for example, in 1993, a significant amount of claimant's work involved fabrication of flight decks for Navy ships.

The only issue before the administrative law judge was jurisdiction. In his Decision and Order, the administrative law judge found that employer's Tidewater Steel facility is bounded on one side by navigable water, and that a significant amount of the work done at the facility is maritime related. Accordingly, the administrative law judge concluded that claimant's injury occurred in an "adjoining area" under Section 3(a) of the Act, 33 U.S.C. §903(a) (1988), and that the situs requirement of Section 3(a) has thus been satisfied. The administrative law judge next found that since a significant amount of claimant's work for employer was maritime in nature, claimant established the status element under Section 2(3) of the Act, 33 U.S.C. §902(3) (1988). Accordingly, the administrative law judge found that claimant established jurisdiction under the Act and awarded temporary total disability benefits. 33 U.S.C. §908(b).

Employer filed its Notice of Appeal of the administrative law judge's Decision and Order on May 25, 1995. BRB No. 95-1556. Employer filed a second appeal

in this case on June 26, 1996; this subsequent appeal concerned the district director's Order Designating Authorized Treating Physician. BRB No. 96-1278. In an Order dated July 31, 1996, the Board consolidated these appeals, holding that, in light of the consolidation, the one year period of review provided by Public Law No. 104-134 will run from June 26, 1996. On September 3, 1996, employer moved to withdraw its appeal of the district director's order, BRB No. 96-1278. Section 802.401(a), 20 C.F.R. §802.401(a), of the Board's implementing regulations provides that at any time prior to the issuance of a decision by the Board, the petitioner may move that the appeal be dismissed. Consistent with this section, we hereby grant employer's motion and dismiss its appeal of the district director's Order Designating Authorized Treating Physician, BRB No. 96-1278, with prejudice. 20 C.F.R. §802.401(a).

Consequently, the only appeal pending in this matter is employer's appeal of the administrative law judge's Decision and Order, BRB No. 95-1556. Arguably, since employer filed a motion to withdraw the consolidated case prior to September 12, 1996, the original May 25, 1995 appeal date should apply, in which case the administrative law judge's decision could be administratively affirmed pursuant to Public Law No. 104-134, since this appeal was more than one year old on September 12, 1996. However, in view of the consolidation of the two appeals and our order stating that employer's second appeal extended the period of review until June 26, 1997, we will consider the issues raised by employer in its appeal of the administrative law judge's decision.

In its appeal of the administrative law judge's decision, employer contends that the administrative law judge erred in finding situs and status. Specifically,

employer asserts that since claimant's injury occurred in a portion of the facility devoted to non-maritime uses, claimant was not injured in an "adjoining area" under Section 3(a). Employer further argues that the status test was not met since the vast majority of claimant's work was non-maritime and he was engaged in non-maritime work at the time of his injury. Claimant responds, urging affirmance of the administrative law judge's decision.

In order to be covered under the Act, a claimant must satisfy both the "situs" requirement of Section 3(a) and the "status" requirement under Section 2(3) of the Act. *See P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Section 3(a) provides that:

> Compensation shall be payable under this Act . . . only if the disability or death results from an injury occurring on the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or *other adjoining area* customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a) (1988) (emphasis added.). In *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT) (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit, wherein this case arises, held that an area is "adjoining" navigable waters only if it is contiguous with or otherwise touches navigable waters. To be included as an "other area" under the Act, the area must be "customarily used by employer in loading, unloading, repairing, dismantling,

or building a vessel." 33 U.S.C. § 903(a) (1988); *see Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10 (CRT) (4th Cir. 1996).

In concluding that claimant's injury had occurred on an adjoining area, the administrative law judge found that employer's Tidewater Steel facility is bound on one side by the South Branch of the Elizabeth River, and that this part of the river is navigable. Moreover, located at the facility is a dock area from which large completed projects are shipped out by barge. Lastly, the building wherein claimant was injured is only 800 feet from the river's edge, and at least one-third of the amount of work performed at the Tidewater facility involves ship construction. *See* Emp. Ex. C. Based upon the foregoing undisputed facts, we hold that the result reached by the administrative law judge is consistent with *Sidwell*; accordingly, we affirm the administrative law judge's determination that employer's Tidewater Steel facility is an adjoining area within the meaning of Section 3(a) of the Act since that facility both touches navigable waters and is customarily used for vessel construction, loading and unloading.

In so holding, we reject employer's contention that for purposes of determining situs, employer's Tidewater Steel facility should be divided into two functioning areas, maritime and non-maritime. Employer argues that since claimant's injury occurred in a portion of the Tidewater Steel facility devoted to non-maritime uses, situs should not be conferred. As the court stated in *Sidwell*, however, the situs inquiry is concerned with whether the parcel of land adjoins navigable waters, "not the particular square foot on that parcel upon which a claimant is injured." *Sidwell*, 71 F.3d at 1140 n.11, 29 BRBS at 144 n.11 (CRT). Thus, situs will be

conferred, even where an injury occurs on a non-maritime portion of a facility, if the overall facility upon which claimant is injured constitutes an "adjoining area" under Section 3(a).[1]

Employer additionally challenges the administrative law judge's determination that claimant satisfied the Act's "status" requirement. Section 3(a) defines an "employee" for purposes of coverage under the Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder and ship-breaker. . . ." *See* 33 U.S.C. §902(3) (1988). While maritime employment is not limited to the occupations specifically enumerated in Section 2(3), claimant's employment must bear a relationship to the loading, unloading, building,

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[1] Employer's reliance on *Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992), and *Eckhoff v. Dog River Marina and Boat Works, Inc.*, 28 BRBS 51 (1994), is misplaced. In *Melerine*, the Board stated that situs is determined by the nature of the place of work at the moment of injury. In that case, the employee suffered an injury at a steel mill that was not used for any maritime purpose. In *Eckhoff*, whether claimant' s injury occurred on an adjoining area was not at issue; the claimant suffered chest pains while working on a pier, an enumerated situs, and at home. The Board reversed the administrative law judge's decision to combine the pier and home into one area, and held that since claimant was injured on an area specifically enumerated in Section 3(a), the situs requirement was met. Thus, these cases are not dispositive of the issue herein. In determining whether an area is an "adjoining area" under Section 3(a), the Board looks to the nature of the place of work at the moment of injury. Accordingly, while claimant in the instant case was injured in the non-maritime bay, the nature of the Tidewater Steel facility is maritime since at least one-third of the work performed at the facility is dedicated exclusively to vessel construction.

or repairing of a vessel. *See generally Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989). Moreover, an employee is engaged in maritime employment as long as some portion of his job activities constitutes covered employment. *Caputo*, 432 U.S. at 275-276, 6 BRBS at 166. Under *Caputo*, a claimant need not be engaged in maritime employment at the time of injury to be covered under the Act, as the Act focuses on occupation rather than on duties at the time of injury. *See, e.g., Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

In determining that claimant satisfied the status requirement, the administrative law judge found that a significant or substantial portion of claimant's regular employment included maritime work. Specifically, the administrative law judge noted that claimant, in 1993, helped fabricate both flight decks and boat cab assemblies for ships, and that claimant thereafter assisted in the installation of the complete flight decks. In challenging the administrative law judge's conclusion that claimant satisfied the "status" requirement of the Act, employer contends that claimant did not routinely or regularly perform maritime activities in his position as a welder. However, our review of the record supports the administrative law judge's conclusion that a significant portion of claimant's job activities involved vessel repair and construction, enumerated occupations under the Act. As the administrative law judge found, claimant's work for employer, at the Tidewater Steel facility and other facilities, involved in large measure the fabrication of Navy and commercial vessels. *See* Emp. Ex. A; Tr. At 21-22, 27. Indeed, employer implicitly concedes that 25 percent of claimant's job duties were maritime in nature. *See* Employer's Brief at 4, 11.

Thus, the testimony and record evidence credited by the administrative law judge establishes, at the very least, that "some portion" of claimant's job activities constituted maritime employment. *See Caputo*, 432 U.S. at 275-276, 6 BRBS at 166; *see also Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990); *Boudloche v. Howard Trucking Company, Inc.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). We therefore affirm the administrative law judge's determination that claimant's maritime welding duties were sufficient to confer coverage under Section 2(3) of the Act, as that finding is supported by substantial evidence and is in accordance with law. *See Schwalb*, 493 U.S. at 47, 23 BRBS at 99 (CRT).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

/s/ ROY P. SMITH
ROY P. SMITH
Administrative
Appeals Judge

I concur:

/s/ NANCY S. DOLDER
NANCY S. DOLDER
Administrative
Appeals Judge

BROWN, Administrative Appeals Judge, concurring:

I concur only in the result reached by my colleagues.

/s/ JAMES F. BROWN
JAMES F. BROWN
Administrative
Appeals Judge